

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD LOVING,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 238179
Wayne Circuit Court
LC No. 01-003060

Before: Neff, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of unlawful use of a controlled substance (heroin), MCL 333.7404(2)(a), following a bench trial. He was sentenced to one year of probation. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

I

Defendant's conviction stems from allegations that in the early morning hours of February 24, 2001, two plainclothes police officers found him in a burned-out, vacant house in Detroit and recovered a plastic sandwich bag of heroin that had been in his possession. According to the officers' testimony at trial, a woman flagged them down to report that she saw someone enter the house and feared that it would be set on fire again. The officers entered the house, using flashlights, and found defendant. One of the officers saw defendant throw down a plastic bag when the flashlight beam shone on him, and then walk quickly away. The baggie contained twelve small paper envelopes of suspected narcotics. Defendant was charged with possession of less than twenty-five grams of heroin, MCL 333. 7403(2)(a)(v).

II

Defendant contends that his conviction of unlawful use of a controlled substance violates his constitutional right to due process because he did not have adequate notice that he would have to defend against this offense, where he was charged only with possession of a controlled substance and there was no allegation of use. We agree.

A

Due process entitles a defendant to reasonable notice of a charge against him and an opportunity to be heard in his defense. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Although a trial court may consider lesser offenses sua sponte, it may not convict a defendant of a crime that has not been charged unless the defendant has adequate notice. *People v James*, 142 Mich App 225, 226-227; 369 NW2d 216 (1985); *People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984). Where notice is inadequate and affects a defendant's ability to defend against the charge, reversal is required. *Darden*, *supra* at 601.

At the time of defendant's conviction, notice was generally held to be adequate if the offense of which the defendant was convicted was a lesser-included offense of the original charge, and the defendant would have notice of the need to defend against the charge given the facts of the particular case. *People v Ora Jones*, 395 Mich 379, 388-390; 236 NW2d 461 (1975); *People v Adams*, 202 Mich App 385, 387-389; 509 NW2d 530 (1993). Thus, a defendant could, under appropriate circumstances, be convicted of an uncharged cognate lesser-included offense, i.e., an offense that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *Id.*

Our Supreme Court has since determined that a defendant may not be convicted of an uncharged cognate lesser-included offense. *People v Pasha*, 466 Mich 378; 384 n 9; 645 NW2d 275 (2002); *People v Cornell*, 466 Mich 335, 358-359; 646 NW2d 127 (2002). A defendant may be only convicted of a necessarily included lesser misdemeanor if supported by a rational view of the evidence.¹ *Id.* The holding in *Cornell* was given limited retroactivity, *id.* at 367, however, because defendant failed to preserve the issue of adequate notice for appeal, this case is not governed by *Cornell*.²

B

We conclude that reversal of defendant's conviction is required because he did not have adequate notice that he would have to defend against the unlawful use offense. Defendant was charged with possession of heroin on the basis of: 1) the baggie found in the vacant house, and 2) one of the officer's testimony that he saw defendant drop a baggie. To prove unlawful possession of heroin, the prosecutor had to show that defendant possessed a controlled substance, that the substance was heroin, that defendant knew that he possessed the heroin, and that the amount was in a mixture of the charged weight. See CJI2d 12.5. Possession is characterized by dominion and control over the drug with knowledge of its character and presence. *People v*

¹ There is no issue of notice with necessarily included lesser offenses, because the principal charge contains all the elements of the necessarily lesser-included offense. *Cornell*, *supra* at 358.

² Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

Nunez, 242 Mich App 610, 615; 619 NW2d 550 (2000). To prove unlawful use of heroin, the prosecution was required to show that defendant used a controlled substance, that the substance was heroin, and that at the time he used it, he knew that the substance was heroin. See CJI2d 12.6.

Neither party contends that unlawful use is a necessarily included lesser offense of possession. See *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991) (“proof of drug use is never *necessarily* presented as part of the proofs supporting possession with intent to deliver”). Even if unlawful use is considered a cognate lesser included offense of possession, *People v Holloway*, 99 Mich App 174, 176; 297 NW2d 607 (1980), *aff’d* 416 Mich 288; 330 NW2d 405 (1982), we find defendant’s claim of inadequate notice valid.

In this case, the proof of possession of heroin did not encompass the use of heroin, such that defendant would be on notice that he should defend against a charge of unlawful use. The facts and circumstances did not implicate the offense of unlawful use. There was no allegation of use with regard to the charged incident, there was no direct evidence of use, and the prosecution did not allude to unlawful use in seeking a conviction. While the trial court’s finding of unlawful use of a controlled substance was apparently intended as a gesture of leniency,³ it is subject to question, and defendant’s claim that he did not have adequate notice of the offense requires reversal of his conviction. See *Pasha*, *supra* at 383 (trial court’s conviction of an uncharged offense, which was likely not a true “cognate offense,” with no explanation regarding why defendant was not guilty of the charged offense, is improper).

In light of our conclusion, we do not address defendant’s argument that there was insufficient evidence to support a conviction of unlawful use.

Reversed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelley

³ The trial court found that the prosecution had proved all the elements of the crime beyond a reasonable doubt, but then stated, “in deference to the defendant’s, my recollection is lack of any criminal record and relatively small amount of herion (sic) found, I will find him guilty of use.”